

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

SAMUEL PETER LORELLO,

Petitioner,

v.

Civil Action No. 5:06CV66
Criminal Action No. 5:00CR32
(JUDGE STAMP)

UNITED STATES OF AMERICA,

Respondent.

REPORT AND RECOMMENDATION
28 U.S.C. § 2255
RECOMMENDING SECOND OR SUCCESSIVE PETITION
BE DENIED

I. PROCEDURAL HISTORY

On May 17, 2002, the *pro se* petitioner, Samuel Peter Lorello, ["Petitioner"], filed a Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. The Government filed its response on September 19, 2002. The Magistrate Judge filed a Report and Recommendation on September 26, 2002 and May 7, 2003, that the motion to Vacate sentence under 28 U.S.C §2255 be denied. On June 13, 2003, the Report and Recommendation was Affirmed and Accepted by the District Court Judge. On June 16, 2006, petitioner filed a Motion Under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. The Government filed its response on June 20, 2006.

This matter is pending before me for initial review and report and recommendation pursuant to LR PL P 83.09.

II. FACTS

A. Conviction

After two days of a jury trial, on April 18, 2001, the petitioner negotiated a plea agreement in which he pleaded *nolo contendere* as to Count 5, Distribution of Crack Cocaine in violation of 21 United States Code 841(a)(1).

B. Sentencing

On June 26, 2001, the Court sentenced the petitioner to 168 months incarceration as to Count 5.

C. Appeal

The petitioner did not file a direct appeal.

D. Federal Habeas Corpus

Petitioner filed his motion to Vacate, Set Aside or Correct Sentence by a person in Federal Custody Under 28 U.S.C. § 2255 on May 17, 2002. The motion was denied on June 13, 2003. Petitioner did not appeal.

On June 16, 2006, Petitioner filed a second Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255.

E. Recommendation.

Based upon a review of the record, I recommend that petitioner's § 2255 motion be denied and dismissed from the docket for lack of jurisdiction because it is a second or successive motion.

III. ANALYSIS

Section 2255 provides as follows regarding a second or successive motion:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

In order for a petition to be considered successive, the first petition must have been dismissed on the merits. Harvey v. Horan, 278 F.3d 370 (4th Cir. 2002). The petitioner's first §2255 motion was considered on the merits. The petitioner's current §2255 motion challenges the same sentence as was challenged in his first §2255 motion. Thus, the undersigned finds that the current §2255 motion is a successive motion.

However, the petitioner did not obtain authorization from the Fourth Circuit Court of Appeals to file his successive §2255 motion in this Court. Thus, pursuant to 28 U.S.C. §2244 and 28 U.S.C. §2255, the Court has no jurisdiction over this matter and must either dismiss the motion for lack of jurisdiction or transfer it to the Fourth Circuit Court of Appeals so that it may perform its "gatekeeping function under §2244(b)(3)." See United States v. Winestock, 340 F.3d 200, 207 (4th Cir. 2003).

Consequently, I recommend the Petitioner's §2255 motion to be denied with prejudice for lack of jurisdiction and his Motion to Compel the Government to File a Response be DENIED AS MOOT.

IV. RECOMMENDATION

The undersigned recommends that the Court enter an Order DENYING WITH PREJUDICE Petitioner's motion and dismissing the case from the docket for lack of jurisdiction because his motion is a successive motion and he has not received authorization from the Fourth Circuit Court of Appeals to file a successive §2255 motion.

Any party may file within ten (10) days after being served with a copy of this Recommendation with the Clerk of the Court written objections identifying the portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable Frederick P. Stamp, Jr., United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation.¹

The Clerk of Court is directed to mail a copy of this Recommendation to all parties of record.

Dated: June 25, 2007

/s/ James E. Seibert
JAMES E. SEIBERT
UNITED STATES MAGISTRATE JUDGE

¹ 28 U.S.C. § 636(b)(1); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), *cert. denied*, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985).